

JOHN A. GRACE,)	
Plaintiff,)	NO. CV-07-00016-JLQ
vs.)	MEMORANDUM OPINION AND
MICHAEL ZIDACK,)	ORDER GRANTING DEFENDANT’S
Defendant.)	MOTION FOR SUMMARY JUDGMENT
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1 approximately 4:30 p.m. the officers set up a covert surveillance coverage of the
2 Supermarket parking lot area in five unmarked vehicles. Plaintiff claims that
3 during the early evening he drove a silver SUV vehicle into the supermarket
4 parking lot and contacted an adult female by the name of Stella Parisian in order to
5 deliver crack cocaine to her. Ms. Parisian was cooperating with the Drug
6 Enforcement Agency.

7 After the drug transaction had taken place, and Ms. Parisian had left
8 Plaintiff's vehicle, the Plaintiff noticed two unknown individuals with something
9 covering their heads approach his vehicle on foot as he backed away from them in
10 the supermarket parking lot. Plaintiff stomped on the accelerator roaring the
11 engine and squealing the tires. While backing out, Plaintiff struck a parking
12 abutment covered with snow and a small tree and became stuck. In an attempt to
13 free his vehicle, Plaintiff shifted into drive in an attempt to free his vehicle. A
14 short time later, a Task Force vehicle that was attempting to block Plaintiff's rear
15 escape struck the rear of Plaintiff's SUV and freed it from the snow berm.

16 Special Agent Zidack was positioned approximately 6 to 12 feet in front of
17 the drivers's side of Plaintiff's SUV in an attempt to contain and arrest him. The
18 SUV's headlights beam illuminated Agent Zidack, who was wearing a ballistics
19 vest with yellow reflective lettering POLICE and an unzipped jacket.

20 Plaintiff states that he drove his vehicle toward Agent Zidack, after shifting
21 the SUV into drive, but argues that Zidack's jacket could have covered the
22 POLICE lettering. However, Plaintiff admits that Agent Zidack was yelling
23 commands at Plaintiff to stop and that he was under arrest, commands, which he
24 did not follow. Plaintiff contends that he looked away from Detective Taylor, who
25 was standing just outside the driver's window and was yelling at the Plaintiff

1 “Police, stop the car” and looked directly forward at Agent Zidack as the SUV
2 caught traction and accelerated forward at Agent Zidack, who was then 6-12 feet
3 directly in front of the SUV and yelling “Stop” and “Police”. The yelling was loud
4 enough for the CI to hear and record. The commands were also heard by another
5 undercover officer, who was sitting inside an undercover vehicle approximately
6 100 feet away. Plaintiff continued surging the SUV forward until he was about
7 one foot away from Agent Zidack. In response, Agent Zidack fired his handgun
8 through the windshield of the Plaintiff’s SUV in an attempt to stop the vehicle.
9 Because of the closeness of the SUV, Detective Taylor and others mistakenly
10 believed Agent Zidack had been struck by the SUV. The bullet did not hit the
11 Plaintiff, rather it exited through and shattered the rear windshield of the SUV.
12 However, shattered glass from the windshield and a fragment of the bullet struck
13 and injured Plaintiff’s left eye and left cheek.

14 Plaintiff then sped recklessly through residential downtown Spokane
15 reaching speeds estimated to be 90 miles per hour, disregarding pedestrian and
16 vehicular traffic on the streets. He ultimately drove the wrong way along one-way
17 streets and through a red stop light and led agents on a circuitous route through
18 downtown Spokane. Eventually, an officer crashed his vehicle into Plaintiff’s
19 SUV in order to stop him. Plaintiff, however, continued to accelerate to a high rate
20 of speed and did not stop until other vehicles also crashed into him. He was
21 hospitalized and eventually suffered partial blindness in his left eye.

22 Plaintiff was ultimately charged by Indictment with one count of
23 distribution of 5 grams or more of cocaine base and one count of assault on a
24 federal officer. Following a four day jury trial, Plaintiff was convicted of both
25 counts. He appealed his conviction to the 9th Circuit, which affirmed his

1 conviction on both counts.

2 Discussion

3 It is Plaintiff's position that Agent Zidack used excessive force in arresting
4 him. However, this court finds that Agent Zidack is entitled to summary judgment
5 on the ground of qualified immunity in the arrest of the Plaintiff.

6 A private right of action exists against police officers who, acting under
7 color of state law, violate federal constitutional rights. 42 U.S.C. § 1983. The
8 defense of qualified immunity, however, protects § 1983 defendants from liability
9 unless their conduct violates a clearly established constitutional or statutory right
10 of which a reasonable person would have known. *Anderson v. Creighton*, 483
11 U.S. 635, 640 (1987).

12 The Supreme Court analyzed a law official's qualified immunity defense in
13 *Saucier v. Katz*, 533 U.S. 194 (2001). Following *Saucier*, a qualified immunity
14 analysis must begin with the threshold question of whether the officer's conduct
15 violated a constitutional right. *Id.* If a constitutional violation occurred, the
16 second inquiry is whether the officer could have reasonably, but mistakenly,
17 believed that his or her conduct did not violate a clearly established constitutional
18 right.

19 Under the Fourth Amendment to the Constitution, Mr. Grace has a right to
20 be free from excessive force. Officers may use only such force as is objectively
21 reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386. 397
22 (1989). A court must therefore balance the nature and quantity of the intrusion
23 against the countervailing governmental interests at stake. *Id.* At 396. "The
24 reasonableness of a particular use of force must be judged from the perspective of
25 a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

1 *Id.* However, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court made
2 clear that it is unreasonable for a police officer to shoot a fleeing burglary suspect
3 in the back where the suspect presented no danger to the police officer or the
4 public. 20/20 hindsight and foresight would prohibit the shooting of a fleeing
5 non-violent drug dealer as opposed to obtaining a warrant for an arrest on another
6 day. However, those were not the circumstances facing Agent Zidack. He was
7 being assaulted with a motor vehicle charging at him. While the test for
8 reasonableness is often a question for a jury, this issue may be decided as a matter
9 of law if, in resolving all factual disputes in favor of the plaintiff, the officer's
10 force was objectively reasonable under the circumstances. *See Scott v. Henrich*,
11 39 F.3d 912, 915 (9th Cir. 1994). The consideration of reasonableness about the
12 amount of force that is necessary in a particular situation must embody allowance
13 for the fact that police officers are often forced to make split-second judgments in
14 circumstances that are tense, uncertain, and rapidly evolving.. *Id.*

15 In *Brausseau v. Haugen*, 543 U.S. 194 (2004), the Supreme Court dealt with
16 a § 1983 claim by a suspect who was shot in the back while fleeing in a vehicle
17 from a police officer, alleging the use of excessive force. The Court noted that it
18 is clearly unreasonable under the Fourth Amendment for a police officer to seize
19 an unarmed, non-dangerous felon by shooting him, but that when an officer has
20 probable cause to believe that the suspect poses a threat of serious physical harm
21 either to the officer or to others, it is not constitutionally unreasonable to prevent
22 escape by using deadly force.

23 The *Brausseau* Court looked at the principles enunciated in *Tennessee v.*
24 *Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) which
25 established that claims of excessive force are to be judged under the Fourth

1 Amendment's "'objective reasonableness" standard. As the Court explained in
2 *Garner*, it is unreasonable for an officer to seize an unarmed, non-dangerous
3 suspect by shooting him dead. However, where the officer has probable cause to
4 believe that the suspect poses a threat of serious physical harm either to the officer
5 or to others, it is not constitutionally unreasonable to prevent escape by using
6 deadly force." The *Brausseau* court then discussed qualified immunity.

7 Qualified immunity shields an officer from suit when [he] makes a decision,
8 that even if constitutionally deficient, reasonably misapprehends the law
governing the circumstances [he] confronted.

9 The *Brausseau* court continued:

10 Qualified immunity shields an officer from suit when [he] makes a
11 decision that, even if constitutionally deficient, reasonably
misapprehends the law governing the circumstances [he] confronted.
12 *Saucier v. Katz*, 533 U.S. at 206 (qualified immunity operates to
13 protect officers from the sometimes 'hazy border between excessive
and acceptable force). Because the focus is on whether the officer
14 had fair notice that [his] conduct was unlawful, reasonableness is
judged against the backdrop of the law at the time of the conduct. If
15 the law at that time did not clearly establish that the officer's conduct
would violate the Constitution, the officer should not be subject to
liability, or indeed, even the burdens of litigation.

16 It is important to emphasize that this inquiry "must be undertaken in
17 light of the specific context of the case, not as a broad general
proposition.

18 There is no doubt that *Graham v. Conner, supra*, clearly
19 establishes the general proposition that use of force is contrary
to the Fourth Amendment if it is excessive under objective
standards of reasonableness. Yet, that is not enough. . . The
20 relevant dispositive inquiry in determining whether a right is
clearly established, is whether it would be clear to a reasonable
21 officer that his conduct was unlawful in the situation he
confronted.

22 *Id.* at 201-202.

23 The Court then looked at a number of cases where the courts found no
24 Fourth Amendment violation when an officer shot a fleeing suspect who presented
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1 a risk to others, including *Smith v. Freland*, 954 F.2d at 347 (6th Cir. 1992)
2 (noting that a car can be a deadly weapon and holding the officers's decision to
3 stop the car from possibly injuring others was reasonable.) In that case, the officer
4 and the suspect engaged in a car chase, which appeared to be at an end when the
5 officer cornered the suspect at the back of a dead-end residential street. The
6 suspect, however, freed his car and began speeding down the street. At this point,
7 the officer fired a shot, which killed the suspect. The court held that the officer's
8 decision was reasonable and did not violate the Fourth Amendment. It noted that
9 the suspect had proven he would do almost anything to avoid capture and posed a
10 major threat to others. The Supreme Court noted that this area is one in which the
11 result depends very much on the facts of each case.

12 The Ninth Circuit in *Blanford v. Sacramento County*, 406 F.3d 1110 (9th
13 Cir. 2005) held that officers acted in an objectively reasonable manner in shooting
14 at the Plaintiff because a reasonable officer in their position at the time would
15 have believed it was necessary. In evaluating the government's interests, the
16 court may consider such factors as the severity of the crime at issue, whether the
17 suspect poses an immediate threat to the safety of the officers, or others, and
18 whether he is actively resisting arrest or attempting to evade arrest by flight.
19 *Graham v. Connor*, 490 U.S. 386 (1989).

20 Here, the governmental interest began with an attempt to arrest Mr. Grace
21 for dealing crack cocaine. As he attempted to flee the scene, the officers were
22 faced with a man who refused to obey the officers' commands to stop and he
23 continued to attempt to flee and resist arrest. Grace, who heard the officers'
24 commands, chose to ignore them and instead charged his vehicle towards Agent
25 Zidack in an attempt to directly harm and/or interfere with Agent's Zidack's

1 attempt to arrest him. This actual interference posed an immediate threat to Agent
2 Zidack's personal safety.

3 Therefore, even if the force used by Agent Zidack was excessive, a matter
4 not determined herein, Mr. Grace has not shown that the use by Agent Zidack of
5 his firearm in overcoming the frantic attempt to flee, resisting a lawful arrest, and
6 assaulting a federal officer violated a clearly established constitutional right. A
7 reasonable police officer could properly believe that the use of his firearm in an
8 attempt to avoid being hit by a SUV charging directly at him from a very short
9 distance in a supermarket parking lot in an attempt to avoid arrest did not violate
10 a clearly established constitutional right.

11 **IT IS SO ORDERED.** The Clerk is directed to enter this Memorandum
12 Opinion and Order. enter judgment of dismissal with prejudice of the Amended
13 Complaint and the claims therein, forward copies to Mr. Grace and to counsel for
14 the Defendant, and close this file.

15 **DATED** this 5th day of August, 2007.

16 s/ Justin L. Quackenbush
17 JUSTIN L. QUACKENBUSH
18 SENIOR UNITED STATES DISTRICT JUDGE
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